

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 35

Docket No. CH-844E-11-0340-I-1

**Ollie Rucker,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

March 16, 2012

Gregory Harmon, Cleveland, Ohio, for the appellant.

Thomas L. Styer, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of the initial decision that reversed OPM’s reconsideration decision. For the reasons set forth below, we REVERSE the initial decision and REMAND the case to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was an Accounting Technician, GS-05, with the Department of Defense. Initial Appeal File (IAF), Tab 1 at 1. She was removed effective December 9, 2008, based on “unacceptable performance.” IAF, Tab 7 at 7-8. The appellant subsequently filed an “expedited grievance” challenging the

agency's action, and, to settle the grievance, the agency agreed to change the stated basis for the removal to "medical inability to perform" and the effective date of her removal to April 3, 2009. IAF, Tab 4, Subtab IIB at 5, Tab 11 at 7-8, 10-14.

¶3 In 2010, the appellant applied for disability retirement under the Federal Employees' Retirement System (FERS). IAF, Tab 4, Subtab IID at 1-5, 14-20, Subtab IIE at 1-3. In her Applicant's Statement of Disability, she described her condition as congestive heart failure. *Id.*, Subtab IID at 1, 15. Thereafter, OPM issued a reconsideration decision in which it denied the appellant's application. *Id.*, Subtab IIA at 1-2. Specifically, OPM found that the appellant failed to submit evidence showing that her condition was incompatible with her duties prior to her removal. *Id.* at 2. The appellant timely filed an appeal of the reconsideration decision. IAF, Tab 1.

¶4 After holding a hearing, the administrative judge issued an initial decision reversing OPM's reconsideration decision. IAF, Tab 12, Initial Decision (ID) at 1, 5. The administrative judge found that, under *Bruner v. Office of Personnel Management*, [996 F.2d 290](#) (Fed. Cir. 1993), the appellant's removal for inability to perform her duties established a prima facie case of entitlement to disability retirement benefits, and the burden shifted to OPM to provide evidence sufficient to support a finding that the appellant was not disabled. *Id.* at 3. The administrative judge acknowledged that the appellant failed to submit evidence from any medical professional showing that she was unable to provide useful and efficient service in the performance of the specific requirements of her position. *Id.* at 5. However, the administrative judge found that, notwithstanding the appellant's failure to submit such evidence, OPM failed to rebut the appellant's prima facie showing that she is entitled to a disability retirement. *Id.* OPM timely filed a petition for review of the initial decision. Petition for Review (PFR) File, Tab 1.

ANALYSIS

¶5 An appellant's removal for physical inability to perform the essential functions of her position constitutes prima facie evidence that she is entitled to disability retirement benefits. *Bruner*, 996 F.2d at 294; *Harris v. Office of Personnel Management*, [110 M.S.P.R. 249](#), ¶ 5 (2008). The burden of production then shifts to OPM to produce evidence sufficient to support a finding that the appellant is not entitled to disability retirement benefits. *Harris*, [110 M.S.P.R. 249](#), ¶ 5. If OPM produces such evidence, the appellant must then come forward with evidence to rebut OPM's assertion that she is not entitled to benefits. *Id.* The Board then considers the totality of the evidence in deciding the disability issue, including objective clinical findings, diagnoses and medical opinions, subjective evidence of pain and disability, evidence relating to the effect of the appellant's condition on her ability to perform in the grade or class of position she last occupied, and evidence that the appellant was not qualified for reassignment to a vacant position at the same grade or level as the position she last occupied. *Id.*

OPM was not required to produce evidence showing that the appellant was able to perform useful and efficient service in order to rebut the *Bruner* presumption of disability.

¶6 Here, the administrative judge properly found that the appellant was entitled to the *Bruner* presumption of disability because she was removed based on her physical inability to perform her job duties. *ID* at 3; IAF, Tab 11 at 7-8. On review, OPM contends that it rebutted the *Bruner* presumption by showing a lack of medical evidence explaining how the appellant was unable to perform her specific work requirements, and cites to *Trevaan v. Office of Personnel Management*, [69 F.3d 520](#) (Fed. Cir. 1995), in support of this argument. PFR File, Tab 1 at 5. Further, OPM asserts that the administrative judge erred by requiring it to submit additional evidence in order to rebut the presumption of disability. *Id.* at 6. For the following reasons, we agree with OPM's arguments.

¶7 In *Trevan*, our reviewing court agreed with the Board’s holding that OPM can meet its burden of production “by demonstrating a lack of objective medical evidence ‘provid[ing] a reasoned explanation of how certain aspects of a particular condition render the employee unable to perform specific work requirements.’” *Trevan*, 69 F.3d at 526-527 (quoting *Thomas v. Office of Personnel Management*, [54 M.S.P.R. 686](#), 689-90 (1992)). Relying on *Trevan*, the Board has held that the lack of any indication in the reports by the appellant’s treating physicians as to how or why her medical condition affected her ability to perform her specific job duties satisfied OPM’s burden of production to rebut the *Bruner* presumption. *Lewis v. Office of Personnel Management*, [87 M.S.P.R. 275](#), ¶ 10 (2000); see *Wilkey-Marzin v. Office of Personnel Management*, [82 M.S.P.R. 200](#), ¶ 8 (1999); see also *Kibble v. Office of Personnel Management*, [80 M.S.P.R. 62](#), ¶ 6 (1998).

¶8 As noted above, the administrative judge acknowledged that the appellant failed to submit objective medical evidence showing that she was unable to provide useful and efficient service in the performance of the specific requirements of her position. *Id.* at 5. However, the administrative judge stated that notwithstanding the appellant’s failure, OPM did not offer any specific evidence, such as testimony from one of the appellant’s supervisors or co-employees, showing the appellant had the capacity to perform useful and efficient service in her position. *Id.* By requiring OPM to produce additional evidence showing the appellant was able to perform useful and efficient service in order to rebut the *Bruner* presumption, rather than allowing OPM to rebut the presumption by demonstrating a lack of evidence showing how the appellant’s condition rendered her unable to perform her job duties, the administrative judge required OPM to meet a higher burden of production than that required under *Trevan*. See *Lewis*, [87 M.S.P.R. 275](#), ¶ 10 (holding that, contrary to the administrative judge’s finding that OPM failed to rebut the *Bruner* presumption, OPM was not required to submit additional evidence to rebut the appellant’s

prima facie case). Accordingly, OPM's argument that it rebutted the *Bruner* presumption of disability by showing a lack of medical evidence explaining how the appellant was unable to perform her specific work requirements has merit.

The appellant is not required to submit medical evidence showing how her medical condition prevented her from performing her job duties to prove entitlement to disability retirement benefits.

¶9 On review, OPM argues that the appellant failed to produce medical evidence explaining how her medical conditions precluded her from performing her specific job duties prior to her removal. PFR File, Tab 1 at 6. While OPM is correct, and the administrative judge agreed, the Board recently overruled a line of cases that indicated that there is a "general" rule that such evidence is required to prove entitlement to disability retirement benefits. *Henderson v. Office of Personnel Management*, [117 M.S.P.R. 313](#), ¶¶ 12-19 (2012); ID at 5. The Board in *Henderson* provided a framework under which to analyze a claim for disability retirement, which we discuss below.

¶10 In *Henderson*, the Board noted that, under the Civil Service Retirement System, OPM's implementing regulation describes two ways to meet the statutory requirement that the employee "be unable, because of disease or injury, to render useful and efficient service in the employee's position": (1) by showing that the medical condition caused a deficiency in performance, attendance, or conduct; or (2) by showing that the medical condition is incompatible with useful and efficient service or retention in the position. *Henderson*, [117 M.S.P.R. 313](#), ¶ 16 (citing *Gometz v. Office of Personnel Management*, [69 M.S.P.R. 115](#), 121 (1995)). The applicable FERS statute and regulation contain the same relevant language. [5 U.S.C. § 8451\(a\)\(1\)\(B\)](#); [5 C.F.R. § 844.103\(a\)\(2\)](#). Under the first method, the employee can establish entitlement by showing that her medical condition affected her ability to perform specific work requirements, prevented her from being regular in attendance, or caused her to act inappropriately. *Henderson*, [117 M.S.P.R. 313](#), ¶ 16. Alternatively, the employee can show that

her medical condition is inconsistent with working in general, in a particular line of work, or in a particular type of work setting. *Id.* But regardless of the particular method of establishing an inability to render useful and efficient service, the burden of proof in every case is by a preponderance of the evidence, i.e., more likely true than not. *Id.*; [5 C.F.R. § 1201.56](#)(a), (c)(2). Thus, if the totality of the evidence indicates that it is more likely true than untrue that an employee's medical impairments preclude her from rendering useful and efficient service, then the employee has met her burden of establishing entitlement to disability retirement benefits. *Henderson*, [117 M.S.P.R. 313](#), ¶ 20.

¶11 Here, the administrative judge did not have the benefit of *Henderson* because it was issued after the initial decision. Accordingly, we find that it is necessary to remand this appeal in order to determine whether the appellant met her burden of establishing entitlement to disability retirement benefits under *Henderson*.

ORDER

¶12 We REMAND the appeal to the Central Regional Office for further adjudication of the appellant's disability retirement claim. On remand, the administrative judge shall provide the parties with the standard for establishing a claim for disability retirement under *Henderson* and the opportunity to submit evidence and argument in response to the administrative judge's order. The administrative judge shall then determine whether the totality of the evidence indicates an entitlement to disability retirement benefits.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.